SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1170

J. R. McLEOD,

Petitioner,

v.

THE CITY OF JACKSON, MISSISSIPPI, A MUNICIPAL CORPORATION

REPLY TO BRIEF IN SUPPORT OF PETITION

City replies, using McLeod's captions for convenience.

Jurisdiction

As hereinbefore stated there is no jurisdiction here for the reasons above indicated. While jurisdiction as to certiorari is broad, Act of Congress of February 13, 1935, Section 237-b, of the Judicial Code 28 U. S. C. A., Sec. 344-B, that done by the State Supreme Court must be either to sustain or deny the Federal right (here it was ignored, properly). Until it shall have been considered, jurisdiction here should not be exercised. *American Federation of Labor* v. *Watson,* — U. S. —, 90 L. Ed. 715.

Statement of the Case

Reference therefor is made to the reply to the petition and integrated hereat.

Argument

I

Petitioner contends:

> "The Action of the City of Jackson in Requiring Petitioner to Surrender His Right to Join the Particular Labor Organization Involved in This Case as a Condition of His Employment With the City as a Policeman, and in Dismissing Petitioner from Such Employment for the Sole Reason That He Expressed an Intention to Join With His Fellow Employees in Such an Organization, Is in Contravention of the First and Fourteenth Amendments to the United States Constitution as Depriving Petitioner of his Civil Rights of Assembly, Speech and Petition."

Whereto city's replies are:

(1) No such question in this record, but if it there be, then

(2) Mississippi's court has made no line of demarcation between that permitted by Mississippi's law and that demanded by the Federal Constitution. Such determination is a condition precedent to judicial review here, *American Federation of Labor* v. *Watson,* — U. S. —, 90 L. Ed. 715; but if, notwithstanding, the Court takes jurisdiction, then

(3) Mississippi's Supreme Court decision (assuming it to have considered that which, with deference, it did not and to have decided that which, with deference, it did not) is correct in this

(a) McLeod's tenure was determinable upon cause, whereasto the Civil Service Commission of Jackson was

the ultimate authority and having terminated that tenure for cause by it deemed adequate, judicial review thereasto improper. The State's determination of the municipality's power is here conclusive. *Railroad Commission* v. *Los Angeles,* 280 U. S. 145, 74 L. Ed. 234; McQuillan, *Municipal Corporations,* Vol. 2, Rev., 2nd Ed., 428, 437, 499; and other authorities cited *supra.*

(b) But if this Court should judicially seek to review that thus administratively properly determined, then Mississippi's determination of cause accords with the unanimous rulings elsewhere, namely: an employer may refuse employment at pleasure to one who insists upon being a member of a union. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 62 L. Ed. 260; Teller, *Labor Disputes and Collective Bargaining,* 1943 Supplement, p. 77, collecting cases; *People ex rel. Furnsman* v. *Chicago,* 278 Ill. 318, 116 N. E. 158, L. R. A. 1917E 1069.

But if this be regarded as a Federal question for decision, we answer the action of the City of Jackson was appropriate and proper for the reasons hereinafter indicated. We challenge the accuracy of introductory remarks insofar as the same are inconsistent with that hereinbefore said.

Petitioner contends:

> "A. Right of Employees to Associate and Assemble Together in a Labor Organization for Purposes of Common Conference and Mutual Assistance Is a Concomitant of the Civil Rights of Assembly, Speech and Petition Sanctioned Under The First Amendment."

Whereto city's reply is:

(1) We are not concerned with the National Labor Relations Act, (July 5, 1935), 49 Stat. 449, c. 372, 29 U. S. C. A. Sec. 151, the Norris-La Guardia Act, (March 23, 1932),

47 Stat. 70, c. 90, 29 U. S. C. A. Sec. 101, nor the Wagner Act, (July 5, 1935), 49 Stat. 449, c. 117, 29 U. S. C. A. Sec. 151, for that whereasto our controversy is: the right of a city not engaged in commerce to do that requisite in the opinion of the constituted authorities to vouchsafe full police protection to the people. Just as the employee may constitutionally do, the employer may likewise constitutionally do and when so doing the law vouchsafed the corelative rights to each.

Compare *Hitchman Coal & Coke Company* v. *Mitchell,* 245 U. S. 229, 62 L. Ed. 260, 276:

> "This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

Approving *Adair* v. *United States,* 208 U. S. 161, 174, 52 L. Ed. 436; *Coppage* v. *Kansas,* 236 U. S. 1, 14, 59 L. Ed. 441.

Compare Teller, *Labor Disputes and Collective Bargaining,* 1943 Supplement, p. 77; Bulletin of International Association of Chiefs of Police, entitled "Police Unions and Other Police Organizations", Bulletin No. 4, dated September 1944; 31 Am. Jur., Sec. 11, p. 838; 26 A. L. R. 158; *Eagle Glass & Manufacturing Company* v. *Rowe,* 245 U. S. 275, 62 L. Ed. 286; *Platt* v. *Philadelphia R. R. Co.,* 65 Fed. 660; *Tosh* v. *West Kentucky Coal Co.,* 252 Fed. 44, 15 A. L. R. 376; *People* v. *Marcus,* 185 N. Y. 257, 77 N. E. 1073; *Nashville Ry. Light Co.* v. *Lawson,* 144 Tenn. 78, 229 S. W. 741; *Callan* v. *Exposition Mills,* 149 Ga. 119, 99 S. E. 300; *Moore Drop Forging Co.* v. *McCarthy,* 243 Mass. 554, 137 N. E. 919; *Courrier & Son* v. *In'l Moulders Union,* 93 N. J. Eq. 61, 115 Atl. 66; *People ex rel. Furnsman* v. *Chicago,* 278 Ill.

318, 116 N. E. 158, L. R. A. 1917E 1069 (1919); *Dantzler Lumber Co.* v. *State*, 97 Miss. 355, 53 So. 1; *Rawlings* v. *City of Newport*, 275 Ky. 183, 121 S. W. 2d 10; *Hopkins* v. *Ames*, 344 Ill. 527, 176 N. E. 729.

Hence when McLeod insisted that, as a municipal policeman, he would be obligated to: "* * * support the products and services of organized labor by making purchases of such products and services; * * *", he became obligated unconditionally to the union viewpoint and as against that viewpoint all others were scabs. That at issue, as shown by Judge Griffith, is not the merits or demerits of labor unions, but solely, may a sovereign state in the discharge of its police power—as to its policemen—exercise that discretion requisite to the conservation of its welfare and design for the preservation of it as an indestructible state as a part of an indestructible union? Compare the Tenth Amendment, Federal Constitution. See also Section 6-190, Mississippi Constitution, 1890, prohibiting impairment police power.

(2) The city neither directly nor indirectly now or heretofore has challenged the right of McLeod and his associates to assemble, to free speech and to petition. Therewith they were not content but in virtue of the right thus to assemble, speak freely and petition, they demand not a concomitant right but a paramount obligation upon the city to forego that deemed by the petitioner to be for his own best interest, quite irrespective of what the constituted authorities think public welfare demands. *Wilson* v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 866; *Heim* v. *McCall*, 239 U. S. 175, 60 L. Ed. 206, approved in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 84 L. Ed. 1108.

McLeod and his associates, pursuant to their right, caused Scott's defeat. Having thus done they now demand that

in virtue of their will the constituted authorities do that which the constituted authorities think is improper.

We do not challenge ought contained in *United States* v. *Cruikshank,* 92 U. S. 542, 23 L. Ed. 588; *State* v. *Butterworth,* 104 N. J. L. 549, 142 A. 57, 58 A. L. R. 744.

Whitney v. *California,* 274 U. S. 357, 71 L. Ed. 1095. Therein, Mrs. Whitney was indicted for violation of California's syndicalism act, convicted, appealed, alleging constitutional right of free speech as to that whereon the conviction was, the crime consisting in substantially that said, and the Court reversed.

Herndon v. *Lowry,* 301 U. S. 242, 81 L. Ed. 1066, involved conviction under a Georgia statute assuming to punish for "attempting to incite insurrection". Defendant claimed the right to speak thereasto. For so doing he was convicted and the conviction was then vacated for a violation of the Fourteenth Amendment. Herein, as above said, petitioner spoke as he pleased, assembled when and as he pleased, and the sole thing by the City of Jackson done was that its Commission determined that a policeman could not be a member of a local union affiliated with the American Federation of Labor. No challenge was made here or at any time of petitioner's right to join any such union, the only thing done was when and if he so did voluntarily. Having thus done, by reason thereof, when commanded not so to do by the city for the public welfare, he was insubordinate, and it was requisite that, having placed his union membership above that deemed essential for the public welfare, the public welfare should be protected and the petitioner left free as a member of the union to seek whatever employment he chose, or, if he could, through his vote, to change the rule in the city government.

DeJonge v. *Oregon,* 299 U. S. 353, 81 L. Ed. 278, did not directly or indirectly involve employer-employee relation-

ship, but in truth that which was clearly within the protection of the Amendment.

Thomas v. *Collins,* 323 U. S. 516, 89 L. Ed. 430, involved punishment for contempt for violation of an injunction issued pursuant to a Texas statute wherein the majority (with deference, without support of the record) held the state could not punish Thomas for jointly

(a) Making a labor speech and generally soliciting adherence to a union; and

(b) Specifically soliciting Pat O'Sullivan to become a member of a local union without acquiring an identification card, where Thomas was a paid labor organizer.

The conviction was reversed because of the inclusion in the punishment of the speech made. The four dissenting Justices, Roberts, Frankfurter, Reed and Chief Justice Stone, held specifically state police power adequate to make regulations. Thereasto the majority did not dissent except when and as only such regulations directly affected the right of free speech and peaceable assembly.

In that case Thomas addressed a meeting and after making a set speech, specifically solicited, contrary to state statute, O'Sullivan, and therefor, with deference, was punished. As far as it goes and so far as it is cognate, it is a decision for the city, the first syllabus accurately saying:

> "An order which in general terms adjudges one guilty of contempt in violating an order restraining him from soliciting union memberships without first obtaining an organizer's card as required by a state statute, will be assumed to have followed the prayer of the motion and the fiat in contempt, which had been issued on the basis of both a general invitation to join a union and the specific solicitation of a particular individual; and, accordingly, on an appeal attacking the

validity of the order under the Federal Constitution, it must either be affirmed as to both invitations or as to neither."

In the opinion, it is said: "That the *state has power to regulate labor unions with a view to protecting the public interest is, as the Texas Court said, hardly to be doubted.*" 141 Tex. 591, 174 S. W. 2d 958. (Italics ours).

Thomas testified "his only object in coming to Houston was to *address this meeting.*" Thereasto the prevailing opinion pointed out:

> "It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."
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> "These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a *particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence.*" (Italics ours).

Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261, 84 L. Ed. 738, expressly recognizes that wherefor we contend:

> "• • • that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has to organize its business and *select its own officers and agents.*" (Italics ours).

Fundamental liberty requires freedom—not constraint—and the city herein selected for those charged with this delicate duty persons who were non-partisan, just as in the trial of this case when the jurors were being selected, interest either way disqualified, and with an oath rendering partiality requisite, fairness was threatened, if not precluded.

Thornhill v. *Alabama*, 310 U. S. 88, 84 L. Ed. 1093. This case condemned an Alabama statute thus characterized (Syl. 7):

> A statute making it an offense to go near to or loiter about, without a just cause or legal excuse therefor, the premises of anyone engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to have business dealings with or be employed by such person, or to picket the works or place of business of another for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise which, as authoritatively construed and applied, leaves no room for exceptions based either on the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute, and which therefore prohibits any means used in the vicinity of a labor dispute to publicize the facts of the dispute, violates the constitutional guaranties of freedom of speech and of the press."

Hague v. *C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423. Therein, the 7th and 9th syllabi are:

> "A municipal ordinance requiring the obtaining of a permit for a public assembly in or upon the public streets, highways, public parks, or public buildings of the city and authorizing the director of public safety, for the purpose of preventing riots, disturbances, or

disorderly assemblage, to refuse to issue a permit when after investigation of all the facts and circumstances pertinent to the application he believes it to be proper to refuse to issue a permit, is not a valid exercise of the police power."

"A decree in a suit to enjoin the enforcement, as against complainants, of a municipal ordinance under which they have been denied the right to hold lawful meetings, is not so vague in its terms as to be impracticable of enforcement or obedience, where it prohibits the defendants from excluding or removing from the city the complainants or persons acting with them, from exercising personal restraint over them without warrant, from confining them without lawful arrest and production of them for prompt judicial hearing, from interfering with their free access to the streets, parks, or public places of the city, and from interfering with their right, and the right of their agents and of those acting with them, to communicate their views as individuals to others on the streets in an orderly and peaceable manner, reserving to the defendants full liberty to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer."

No one sought to compel McLeod not to do that by him as a citizen deemed appropriate but as a public police employee, his viewpoints were of most material interest to his employer and to have a bias in favor of one class of his employer as against another class of his employer, was such a condition as rendered it appropriate for the city to exclude any person with such a biased viewpoint. If McLeod wanted to be a policeman he had to be a policeman all the way through and with no other obligation wherethrough his performance of duty might be thwarted or embarrassed.

McLeod contends:

"B. The State Can Restrict or Restrain the Exercise of Civil Rights, as Distinguished from Dealing

with Abuses Arising Therefrom Only When Such Exercise Involves Grave and Immediate Danger to Public Interests—Circumstances Not Present in the Instant Case."

Therewith, under the unanimous holdings of all courts wherein this question has, up to now, been presented, McLeod's view has been denied and, with deference, properly so.

Reference is made to that part of the *Thomas* v. *Collins*, 323 U. S. 516, 89 L. ed. 340, opinion declaring:

> "Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

But herein no restraint on assembly, speech or petition has been placed other than the majority, with a right to determine, have found that the local officers should be in a position where the public peace is paramount and should not be imperilled by possible divided allegiance. These officers were obligated to anticipate and look to the future. In the *Collins* case penalty was sought to be imposed for that precedently done but under the police power, just as in medicine, an ounce of prevention may be worth a pound of cure. Under present strike conditions, the military arm must represent organized government and not a segment sometimes seeking to overthrow the same.

West Virginia v. *Barnett*, 319 U. S. 624, 87 L. ed. 1628, —salute the flag question—does not touch the power of the state to protect by anticipation as against conditions reasonably to be anticipated in the employment of police officers. The city certainly, for the public welfare, could not possibly have a less right than is confessedly possessed by a private employer. It must not be overlooked that

McLeod conceded (if he had not been a member and were applying for a position) that the city could exclude him by reason of his union affiliations. If initial exclusion, as admitted, constitutes adequate ground, then the same ground would be operative to terminate existing relationship and, with deference, there can be no valid distinction drawn. *Communis error facit jus.* The portion quoted as to serious injury has to do with punishment for utterances imposed after the utterances are had and in no wise has to do with the controlling by the national government of the policy of the State in its police power.

The City of Jackson, like every other city, has, under present conditions, strikes in store for it, whether we like it or not ,and to protect the public it had to have an "army" competent to deal with those who were seeking to subvert the public peace and if that army thus sought to be solely loyal at the same time was under oath to promote that deemed by the "enemy"—the unions—as essential, no one would contend that the army could or would be effectual. That type of question is not judicial and thereasto, with deference, the court must not deal. The judgment of the military commission, substantially such, is that which should be allowed to admeasure safety. Compare *Matter of Yamashita,* — U. S. —, 90 L. ed. 343.

Just as pointed out in the *St. Louis* case, the public is not to be left to self-denial on the part of its employees, and birds of a feather frequently, if not always, flock together. It has a right to absolute loyalty without qualification or condition and the fact that employees might forego voluntarily does not guarantee the public safety for the public has a right to compel that which is requisite for its protection and this national has two types, so-called, of unions: one, wherein it does not strike as against constituted authority; and the other where it does, as was the

case in Philadelphia, strongly suggesting that when and if it becomes potent enough it will have but a uniform rule. The right to strike is paramount. The court here could have found, if this were a judicial question, that, quoad, this situation, this union was but a wolf in sheep's clothing and with the public safety in the balance, no question of disloyalty should be tolerated.

The inter-relation between this particular union and its parent union was in writing and consciously was not produced on this hearing, the presumption therefrom is adverse under Mississippi's jurisprudence. West, *Mississippi Digest,* "Evidence," Key No. 77.

No authorities are cited and, with deference, none can be which takes away from the city its right to safeguard its peace by requiring that there be no division of loyalty between the State and those adversely interested and the labor unions presently are in many instances "adversely interested," to say the least of it, for but what, with deference, is an unlawful act? They have brought and are bringing this Nation to the brink of disaster, causing, and likely to cause, far greater danger than was ever caused by the trusts and just as the law curbed the trusts so must it curb those who would destroy the peoples' safety for their own private profit irrespective of how the public is made to suffer thereby. *Salus populi suprema lex.* Broom's Legal Maxims.

McLeod contends:

> "C. The State or a Branch Thereof Does Not Possess Absolute Power to Condition Employment with It; Such Power Is Limited at Least by the Provisions of the First Amendment."

Whereto city's reply is:

(1) Answered *supra* in part.

(2) The State in no way subordinate to the United States.

Fundamentally, the State of Mississippi and the United States co-exist, each within its respective sphere, exercising that portion of sovereignty to it allocated under the Constitution. Both governments are dependent for the accomplishment of their governmental purposes upon officers and employees and each is as to its officers and employees independent of the other, and not to be as to them in any way burdened. Initially, it was so held, beginning with *Dobbins* v. *Erie County,* 16 Pet. 435, 10 L. ed. 1022, *Collector* v. *Day* (*Buffington* v. *Day*), 11 Wall. 113, 20 L. ed. 122; *Graves* v. *New York,* 306 U. S. 480, 83 L. ed. 933.

We are conscious that subsequently it was held that an income tax non-discriminatorily levied by one sovereignty could be collected from the employees of the other sovereignty as the economic burden rested upon the employee and not upon the sovereign employing. Compare *Helvering* v. *Gerhardt,* 304 U. S. 405, 82 L. ed. 1427; *Graves* v. *New York,* 306 U. S. 481, 83 L. ed. 927; *M'Culloch* v. *Maryland,* 4 Wheat. (U. S.) 316, 376, 4 L. ed. 579, 594; *United States* v. *County of Allegheny,* 88 L. ed. 1209, 322 U. S. 174. However, as to who shall be officers of the United States and who shall be officers of the State, the other government has no right at all thereasto to interfere, each being quoad its essential officers, an independent sovereignty.

Compare the great case of *South Carolina* v. *United States,* 199 U. S. 437, 50 L. ed. 261, wherein it was said:

> "In other words, the two governments—national and state—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers."
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> "In *Texas* v. *White,* 7 Wall. 700, 725, 19 L. ed. 227, 237, Mr. Chief Justice Chase, speaking for the court, declared:

"'Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.'"

* * * * * * *

"If it be said that the states can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the national government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland,* 4 Wheat. 431, 4 L. ed. 607, for a complete answer:

"'But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.'"

And thus was sustained the right of the United States to tax liquor even though handled by South Carolina. Even as to this, there was a dissent by Justices White, Peckham and McKenna, wherein it was said:

"The delicacy of the question, the suggestion that, apart from constitutional limitations, the ruling made is, from an economic point of view, a just one, and the

> long and painstaking consideration which the court has given the case, cause me to be reluctant to announce a dissent. This, however, is overborne by the conviction that it is my duty to dissent and state my reasons. And this because the decision now made, as it is by me understood, overrules many cases, departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the government of the United States, establishes a doctrine which, in its potentiality, strips the states of their lawful authority."

And much force, with deference, may thereto be accorded.

Compare *Helvering* v. *Powers,* 293 U. S. 214, 227, 79 L. Ed. 291; *United States* v. *State of California,* 297 U. S. 175, 80 L. Ed. 567.

Compare *Helvering* v. *Therrell,* 303 U. S. 222, 82 L. Ed. 762, where it is said:

> "What limitations does the Federal Constitution impose upon the United States in respect of taxing instrumentalities and agencies employed by a State and, conversely, how far does it inhibit the States from taxing instrumentalities and agencies utilized by the United States, are questions often considered here. (Citing cases).
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> "The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them.
>
> "Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential

governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

"By definition precisely to delimit 'delegated powers' or 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances. Notwithstanding discordant views which have sometimes arisen because of varying emphasis given to one or another of such circumstances, it is now settled doctrine that the inferred exemption from federal taxation does not extend to every instrumentality which a State may see fit to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference."

That done by a policeman is in the highest sense governmental. *Glover* v. *Columbus,* 197 Miss. 467, 19 So. 2d 756; *Monette* v. *State,* 91 Miss. 662, 44 So. 989. Under these decisions, frankly, there is no power in the National government to interfere nor to declare this section of this statute unconstitutional.

We are conscious of the limitations placed by this court in *State of New York and Saratoga Springs Commission* v. *United States,* — U. S. —, 90 L. Ed. 265; *Case* v. *Bowles,* — U. S. —, 90 L. Ed. 398; and *S. R. A., Inc.* v. *State of Minnesota,* — U. S. —, 90 L. Ed. 663; but we submit that the law, as above quoted, is not altered insofar as that here at issue.

Hence, as to this governmental function, Mississippi is co-equal with the United States and in no way subordinate thereto, but if therein there be inferiority by reason of the Supremacy Clause, still Mississippi has not in any way indicated what law in this regard will be and until she does, under settled decisions here, this Court will not intervene.

Compare *American Federation of Labor* v. *Watson*, — U. S. —, 90 L. Ed. 715; and *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 89 L. Ed. 101.

(3) But should the Court disagree, then, with deference, Mississippi, through her administrative agencies is the judge of that whereasto this action is taken. *Railroad Commission* v. *Los Angeles*, 280 U. S. 145, 74 L. Ed. 234. Mississippi has certainly the same constitutional right as a private employer and when and if a private employer, for pecuniary gain, may not be compelled to involuntarily utilize union labor, then surely for the public welfare, the State may do that in its more important sphere and protect its people, just as a private individual may protect his money.

This issue is one whereasto, with deference, no provision may be found in the Federal Constitution, especially in view of the Tenth Amendment whereby the State has foregone that essential power requisite for its protection and preservation.

(4) We would concede that under the Thirteenth Amendment, prohibiting discriminations based on race, color and previous condition of servitude, expressly the States thereby forewent power to prescribe that their employees should be all Caucasians with exclusion of Negroes, all white men with exclusion of black and yellow, all free men and none slaves, but when the State comes within the ambit of the Fourteenth Amendment, there is no such foregoing of its sovereignty and there has never been property in public service—public welfare.

(5) And naught in *People* v. *Crane*, 214 N. Y. 154, affirmed in 239 U. S. 195, goes *contra* to the contention herein made, for McLeod consciously assumed a relationship under which he bound himself to forego his individual rights to purchase

where he pleased and do as he pleased, and was compelled to purchase from those who produced under the union label and act in the cause of labor when the cause of labor, as contended, conflicted with the cause of government. Quite irrespective of whether union or non-union was best, he must needs buy that union made and must allegiance bear to union policy even though therein he did not believe, and having voluntarily become "a union man" he was no longer a free man, but obligated to uphold tenets conflicting with the rights of those with whom he would come in contact and for whom he would act as a public servant. If the city might not anticipate possible conflicts between union and non-union, it could not adequately protect itself, and current conditions show that public protection presently requires non-affiliation.

Until the overruling of *Monette* v. *State,* 91 Miss. 662, 44 So. 989, by *Glover* v. *Columbus,* 197 Miss. 467, 19 So. 2d 756, McLeod would have been a public officer and by Section 250 of Mississippi Constitution it was provided:

> "All qualified electors and no others, shall be eligible to office, except as otherwise provided in this Constitution."

Under this section, the Legislature could not add to the qualifications of any officer. *McCool* v. *State,* 149 Miss. 82, 115 So. 121. But when McLeod was placed in the employee class to carry out that presently requisite, Mississippi had the right to exact unquestioned loyalty.

There is no need to discuss hypothetical cases. The issue before this Court is as to a specific person occupying a specific position with a specific obligation to perform.

There are certain cases cited whereto specific reference has not been made but they have been materially considered in the preparation of this response.

II

With deference, answered *supra*.

WHEREFORE, we respectfully submit that certiorari should not be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,803

J. R. McLeod, In Banc:

vs.

Civil Service Commission of Jackson, Mississippi

Per Curiam:

Before proceeding further with this case, the Court desires additional briefs from counsel *addressed and confined* to the following questions:

1. Did the court below err in overruling the appellant's motion for a trial de novo before a jury?

2. What portion, if any, of the transcript of the proceedings before the Civil Service Commission remained in the record after the court below had sustained the appellee's motions to strike this transcript, or a portion of it, from the record?

3. If a sufficient portion of that transcript remained in the record from which this Court can say that the appellant was discharged by the City Commission from the police force because he had become a member of a labor union, and this Court should be of the opinion that membership in such a union tended to injure the public service, was therefore just cause for appellant's discharge, and in a jury trial the court should so instruct the jury, what harm, if any, was done this appellant by the court below in refusing him such a trial?

4. After the court below declined to grant the appellant a jury trial and struck from the record the transcript of the proceedings before the Civil Service Commission, was it not incumbent on the appellant to introduce evidence before the court proceeded to a decision of the case? In other words, if he offered no evidence, was it not the duty